

# Government Data Rights Under the DFARS

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# Types of Data provided to the Government Under Contract

- **Data is a generic term covering Technical Data and Computer Software:**
  - **Data is either Noncommercial (military) or Commercial**
  - **Technical Data – Recorded information, regardless of the form or method of recording, of a scientific or technical nature, e.g. drawings.**
  - **Computer Software – Computer programs, source code, source code listing, object code listings, design details, algorithms, processes, flow charts, formulae.**
  - **Special Works – Literary, musical, dramatic works, pictorial, sculptural works, motion pictures, etc.**
- **Government obtains data rights to use technical data and computer software from the data rights clauses in government procurement contract. Data rights do not concern contractors' rights to use the data. Contractor is always able to use the same data for its own commercial purposes unless there are restrictions, e.g., security concerns, classified.**
- **Most of the time the government NEVER receives title to technical data or computer software, title remains with the contractor.**
- **Government receives licenses (on how government may use and to whom it may give such rights) of varying scope for the use of recorded information and software.**

# DFARS and Copyright

- **Unlike the U.S. Government works, works/data produced for the government under a contract are protected under U.S. Government Copyright Law.**
- **Under the DFARS, copyright ownership remains with the contractor unless assigned to the government (Special Works Clause requires assignment).**
- **Copyright Rights: Reproduction, Public Release, Modification, Distribution, Display.**
- **DFARS allows for a copyright marking as provided in the Copyright Statute, e.g., © 2009 Jane Doe, Inc.**
- **Copyright marking should not hinder distribution within the government. Distribution Statement may be of concern as well as export controls, and classified information.**

# DFARS and Copyright Continued:

- Contractor essentially provides the government with a License in any copyright or trade secret claimed in the technical data/computer software of a scope commensurate with the license rights obtained by the government in the data. There are no trade secrets when the data rights are unlimited in scope, other restrictions may apply, e.g., classified information, export controls, Distribution Statements.
- FAR provides for different results. FAR includes data rights procedures that apply only to civilian agencies and different results may occur.  
See: [http://www.cendi.gov/presentations/copyright\\_borda.ppt](http://www.cendi.gov/presentations/copyright_borda.ppt)  
Government Data Rights Under the FAR, Gary G. Borda

# How Will the Government Use the Data Provided?

- Internal Use only by the agency
- Interagency Use
- Further procurements
- Improvements
- Public Distribution

# DFARS Data Rights Provisions

- **Policy in DFARS Part 227    Clauses in DFARS Part 252**
- **Rights in technical data-Noncommercial items**  
    **DFARS 252.227-7013**
- **Rights in noncommercial computer software and noncommercial computer software documentation**  
    **DFARS 252.227-7014**
- **Technical Data – Commercial Items**  
    **DFARS 252.227-7015**
- **Rights in bid or proposal information**  
    **DFARS 252.227-7016**
- **Rights in noncommercial technical data and computer software – Small Business Innovation Research**  
    **DFARS 252.227-7018**
- **Rights in Special Works (will not be discussed) (Copyright must be assigned) This clause is rarely used.**  
    **DFARS 252.227-7020**
- **Know the clause dates to distinguish rights, DFARS 1988 vs DFARS 1995.**
- **Know the lowest component level or module developed by a contractor, i.e., determinations made at the lowest practicable level.**

# Rights in Contract Deliverables Under the DFARS

- Government Purpose Rights
- Restricted Rights – Computer Software
- Limited Rights - Technical Data
- Unlimited Rights
- Specially Negotiated License Rights
- SBIR Rights
- Rights in Special Works

# Funding and Determination of Government Rights

- **Funding at issue is the funding to develop the item, component or process depicted by the technical data or to develop the computer software – Note: it is not the funding to create the technical data itself (unless the creation of data was an element of performance specified under the contract). Developed defined as item, component or process that exists and is workable. Technical data pertains to the item, component or process.**
- **Government provides all the funding – Unlimited Rights-developed with government funds.**
- **Government and contractor each provide funding – Government Purpose Rights-developed with mixed funding, percentage funded by either party is irrelevant.**
- **Contractor provides all funds (developed exclusively at private expense or IR&D) (Commercial software/open source software) – Limited or Restricted Rights**
- **Exceptions to source of funding rule (Government receives Unlimited Rights regardless of funding), e.g., computer software documentation is a deliverable.**
  - **DFARS 252.227-7013(b)(1)(ii-ix), 252.227-7014(b)(1)(ii-ix)**



# Copyright License and Government Purpose Rights

- **Contractor grants or obtains for the government:**  
**License rights that permits the government to:**  
**reproduce data, distribute copies of the data, publicly perform or display the data or prepare derivative works through the right to modify.**
- **The license is commensurate in scope with data rights license inside and outside the government.**

# Government Purpose Rights Within/Outside the Government

- **Government Purpose Rights:**
  - Use, modify, reproduce, release, perform, display, or disclose technical within the Government without restriction; and
  - Release or disclose technical data outside the Government and authorize persons to whom release or disclosure has been made to use, modify, reproduce, release, perform, display, or disclose that data for United States government purposes.
- **Government Purpose definition:**

“Government purpose” means any activity in which the United States Government is a party, including cooperative agreements with international or multi-national defense organizations, or sales or transfers by the United States Government to foreign governments or international organizations. Government purposes include competitive procurement, but do not include the rights to use, modify, reproduce, release, perform, display, or disclose technical data for commercial purposes or authorize others to do so.

  - International transactions, e.g., foreign military sales
  - License usually converts to Unlimited Rights for the government 5 years after execution of the contract unless otherwise negotiated.

# Limited Rights/Restricted Rights Within/Outside the Government

- The government may NOT, without written permission of the party asserting limited rights:
  - Release or disclose the technical data outside the government, except in limited circumstances, e.g., emergency repair and overhaul
  - Use the technical data for manufacture
  - Authorize the technical data to be used by third-party to become a competitor of the developer
  - Use the data for competition purposes
  - Government can use the technical data to use, duplicate or disclose technical data within the government
- Cannot use for competitive reprocurement purposes
- The government may NOT, without permission of the party asserting restricted rights:
  - Give the software to a third-party to duplicate or commercialize
  - Give to third-party to reverse engineer
  - Give to third-party for reprocurement purposes

# Unlimited Rights and Special Works Outside the Government

- **Unlimited Rights**
  - **The contractor owns the copyright for works/data created under the contract, DFARS 227-7103-9, DFARS 252.227-7103-4.**
  - **Includes the right to distribute to the public**
    - **U.S. Government contract work subject to the following license:**  
**The Government is granted for itself and others acting on its behalf a paid-up, nonexclusive, irrevocable worldwide license in the work to reproduce, prepare derivative works, and perform publicly and display publicly by or on behalf of the Government.**
  - **Generally government rights do not transfer to the public.**
- **Special Works**
  - **Contractor assigns their copyright to the Government.**
  - **The Government owns/retains the copyright.**

# Marking of Data by Contractor

- Clauses specify exact wording of markings and marking locations. Double check/validate all markings.
- No markings specified with unlimited rights. If unmarked, the government can assume unlimited rights when data required to be delivered under the contract.
- Watch out for Drafts as Drafts might not be a deliverables and thus no markings are required. It is the contractor's duty to protect its trade secrets, a release without marking is a release without a marking.
- Copyright notice permissible: © 2009 Jane Doe, Ltd.
- “All Rights Reserved” not a permissible marking except with the Special Works Clause.

# Copyright Infringement

- **28 U.S.C. § 1498(b) provides the exclusive remedy for copyright infringement by or on behalf of the government. It is a suit for monetary damages against the government in the Court of Federal Claims. There is no injunctive relief available and for the most part there is no direct cause of action against a contractor that is infringing a copyright on behalf of the government.**
- **DFARS 227.70 Infringement Claims, Licenses and Assignments (Administrative Claim Procedure for copyright infringement.)**
- **Department of Justice will handle copyright infringement actions pursuant to Title 28. Defense Agency will handle an Administrative Copyright Claim.**
- **DFARS 252.227-7013 does not permit a contractor to incorporate a third party's copyrighted data/software into a deliverable data item unless the contractor has obtained an appropriate license for the government. Grant approval to use third party copyrighted data in which the government will NOT receive a copyright license only when the government requirements cannot be satisfied without the third party material or when the use of the third party material will result in cost savings to the government which outweigh the lack of a copyright license. See DFARS 227-7103-9 and 227-7203-9**

# Government Created Content Contracted Works

- Contracts must specify **both** the deliverables (item, component and process) (computer software) and the data rights in deliverables.
- *If you don't ask for it, you don't get it.*
  - Data Rights clauses do not get delivery of data
  - You must list data deliverables in a CDRL or Statement of Work
- Government and contractor rights in data depend on the contract clauses.
  - More than one clause may apply
  - Even Purchase Orders may need a Data Rights clause
  - Without it, Government could pay for creation of the data but have no rights to use it
- Consult with General Counsel about which clauses are needed.

# Noncommercial Data Rights Assertion Categories

Rights Category	TD or CS?	Criteria for Applying Rights Category	Permitted Uses Within Government	Permitted Uses Outside Government
Unlimited Rights (UR)	TD and CS	TD that is: 1) Developed exclusively at Government expense; 2) test data; 3) form, fit and function data; 4) necessary for operation, maintenance or training; 5) corrections or changes to TD previously delivered to the Government; or, 6) otherwise publicly available.	Unlimited; no restrictions.  Note: If a third party copyright is asserted in TD/CS that is delivered with UR, under DFARS 227.7203-9 the delivering contractor must grant or obtain for the Government license rights that permit the Government to reproduce, perform or display the software or documentation; distribute copies; and, through the right to modify data, prepare derivative works. If the contractor does not obtain an appropriate license for the Government, then the contractor should not incorporate the unlicensed copyrighted material into the deliverable TD/CS without the Contracting Officer's written approval.	
Government Purpose Rights (GPR)	TD and CS	Development with mixed funding.	Unlimited; no restrictions.	For "Government Purposes", <b><u>including repurchase</u></b> ; no commercial use. Must have recipient sign a Non-Disclosure Agreement (NDA).
Limited Rights (LR)	TD only	Development exclusively at private expense.	Unlimited; except may not be used for manufacture.	Emergency repair/overhaul; evaluation by foreign government; may also disclose subject to a prohibition on any further disclosure after notifying the asserting contractor.



# Noncommercial Data Rights Assertion Categories (Continued)

Rights Category	TD or CS?	Criteria for Applying Rights Category	Permitted Uses Within Government	Permitted Uses Outside Government
Restricted Rights (RR)	CS only	Development exclusively at private expense.	Government may: 1) Use on one computer at a time; 2) transfer to another Government entity (transferor must destroy all copies); 3) make minimum backup copies; and 4) modify, provided there is no release or disclosure outside Government.	Emergency repair/overhaul (w/NDA). Support contractors may use (w/NDA).
Prior Government Rights (DFARS 252.227-7028)	Both TD and CS	Whenever Government has previously acquired rights in the deliverable TD/CS.	Same as under previous contract.	
Specifically Negotiated License Rights (SNLR)	Both TD and CS	Mutual agreement of the parties; use whenever the standard categories do not meet both parties' needs.	As negotiated by the parties; however, must not be less than LR in TD and must not be less than RR in CS.	
SBIR Data Rights	Both TD and CS	Whenever TD/CS is generated under a SBIR contract, <b>regardless of funding</b> . SBIR Data Rights expire five years <u>after completion of the SBIR project</u> from which such TD/CS were generated.	Within Government, use and disclosure is unlimited.	Cannot release or disclose SBIR data outside of Government, other than support services contractors, except: 1) as expressly permitted by the Contractor; 2) for evaluation purposes; or, 3) for emergency repair or overhaul. When disclosed outside Government, an NDA is required. 17

# Commercial Data Rights Assertion Categories

<b>Rights Category</b>	<b>TD or CS?</b>	<b>Criteria for Applying Rights Category</b>	<b>Permitted Uses Within Government</b>	<b>Permitted Uses Outside Government</b>
Standard DFARS "7015" Rights	TD only	Default category for all commercial TD (TD pertaining to commercial items) <b>except</b> those qualifying for Unlimited Rights.	Unlimited; except may not be used for manufacture.	Only with Contractor's written permission or for emergency repair/overhaul.
Unlimited Rights (UR)	TD only	Commercial TD that: 1) has previously been provided to Government or is already publicly available without restrictions; 2) is "form, fit and function"; 3) is a correction to TD previously delivered to the Government; 4) has been provided to the Government with UR from a prior contract; or, 5) is necessary for operation, maintenance, installation or training.	Unlimited; no restrictions.	
Standard Commercial License	CS only	Default rights category for all commercial CS.	As specified in the license customarily offered to the public. DoD must negotiate for any specialized needs, or if any of the license terms are unacceptable to the Government.	
Specifically Negotiated License Rights	Both TD and CS	Mutual agreement of the parties; should be used whenever the standard categories do not meet both parties' needs.	As negotiated by the parties; however, by statute, the Government cannot accept less than the minimum standard 7015 rights in commercial TD.	